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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

McGREGOR SEA & AIR SERVICES (AMERICA) INC., A Delaware Corporation,

Plaintiff,

vs.

CINEMATRONICS, INCORPORATED, A California Corporation,

Defendant.

CASE NO. 491479

POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION TO SET ASIDE RIGHT TO ATTACH ORDER, QUASH WRIT OF ATTACHMENT, AND RELEASE ATTACHED PROPERTY

DATE: SEPTEMBER 9, 1982
TIME: 3:00 P.M.
DEPT: 12

PRELIMINARY STATEMENT

Defendant alleges, in its effort to frustrate the legitimate collection efforts of an unpaid creditor, that the Court has been mislead by plaintiff. This allegation is both spurious and erroneous. Defendant identifies plaintiff as a "supplier" when it is well aware that plaintiff operated in the instant matter as a customhouse broker and freight forwarder advancing cash sums on behalf of defendant upon defendant's promise to repay those sums upon presentment. Defendant also incorrectly asserts that plaintiff and defendant have entered

into a novation for valuable consideration. This court was not informed that a novation had occurred for the simple reason that no novation did in fact occur. Furthermore, had a novation in fact occurred, the promises underlying it would be totally and completely unenforceable in view of the fact that there was no consideration for the promises allegedly made by plaintiff. As will be more fully set forth in a succeeding paragraph, a promise to pay a portion of a pre-existing debt is legally insufficient consideration for a promise to forbear collection on the entire debt.

In response to the allegation that plaintiff has sought to attach more property than is necessary to secure its claim, plaintiff respectfully suggests that it is the burden of defendant to establish that the assets currently under levy of attachment "clearly exceed the amount necessary to satisfy the amount to be secured by the attachment" as provided for in the Code of Civil Procedure.

I

NO NOVATION OCCURRED IN THE INSTANT CASE.

Defendant alleges in this case that there has been a written novation of the contract which is the subject of plaintiff's suit. Defendant apparently refers to several letters attached as exhibits to its application to set aside the writ. Defendant confuses what it believes to be evidence of a written contract with the written contract itself. The letters merely serve as memoranda of the events which occurred on June 29, 1982. They clearly do not constitute a contract of themselves.

Plaintiff does not contend that an oral agreement will not operate as a novation assuming the required elements of a novation are present. Plaintiff, on the other hand, contends that the requirements necessary to establish any contract, including a novation, simply are not present in this case.

First, a novation requires an intent on the part of both parties to the transaction to discharge the old contract. Blumer v. Madden 128 Cal.App. 22 (1932).) Thus, where one party is indebted to another, and the creditor takes his promissory note for the sum owed, this does not discharge the original debt unless the parties expressly so agree, or unless such intention is clearly indicated. (The Western Fuel Company v. Lewald Company 190 Cal. 25 (1922); Easton v. Ash 18 Cal.2d 530 (1941).)

A novation is the substitution by agreement of a new obligation for an existing one, with intent to extinguish the latter. (Civ. Code § 1530-1532.) It cannot be seriously contended that McGregor Sea & Air Services (America) Inc. intended to extinguish the obligation of Cinematronics, Incorporated to pay it $97,807.13 in exchange for an immediate payment of $10,000 and a promise to "try" to pay the balance within six months if convenient. At the most, defendant might argue that plaintiff agreed to forbear collection efforts on the existing obligation. To forbear collection efforts is not to extinguish an existing debt.

A novation requires consideration. Defendant cites the case of Manfre v. Sharp 210 Cal. 479 (1930) for the proposition that consideration for a novation may simply be the

release of an old obligation. This citation is not in point. Manfre v. Sharp involves the release of one debtor in exchange for a promise made by a new succeeding debtor. In that case, the court held that the release of the old debtor was sufficient consideration for the new debtor's promise. The case had absolutely nothing to do with whether or not there had been consideration for the creditor's promise to agree to the substitution. The case is clearly inapplicable to the situation involved in the instant litigation. In this case, the question is whether or not there is consideration for the creditor's promise not the debtor's promise. Plaintiff is not seeking to enforce a novation as against defendant, defendant is seeking to assert a novation as against plaintiff. There was no consideration for an alleged promise on the part of plaintiff McGregor Sea & Air Services (America) Inc. to forbear its collection efforts. Defendant alleges that the payment of an immediate $10,000 constitutes consideration for the promise it alleges was made. This is simply not the case.

At the point in time when the June 29th meeting occurred, defendant's account, which called for payment upon presentment of invoice, was over thirty days in arrears. A promise to pay $10,000 immediately was purely and simply a promise to partially satisfy an obligation with which Cinematronics, Incorporated was already burdened. Stated simply, McGregor Sea & Air Services (America) Inc. received absolutely nothing that it was not already lawfully entitled to in consideration for its alleged promise to forbear.

. . . . .

Under the definition of consideration in Civil Code section 1605, doing or promising to do what one is already legally bound to do cannot be consideration for a promise. (Burner v. American Mining Co. 76 Cal.App. 774 (1926); Pacific Finance Corporation v. First National Bank 4 Cal.2d 47 (1935); General Motors Acceptance Corporation v. Brown 2 Cal.App.2d 646 (1934); Grant v. The Aerodraulics Co. 91 Cal.App.2d 68 (1949).)

On June 29, 1982, defendant was under a pre-existing obligation to pay the plaintiff $97,807.13, assuming, arguendo, that plaintiff agreed to withhold collection efforts for a period of six months, it received nothing by way of an agreement to pay interest or an additional sum of money which would constitute consideration for its alleged promise. The receipt of $10,000 was simply collection of an amount which was sorely overdue. To suggest that plaintiff should have rejected the tender of this partial payment does not make sense.

II

IF THE ATTACHMENT LEVY IS EXCESSIVE, DEFENDANT SHOULD INTRODUCE EVIDENCE OF THAT FACT.

Defendant alleges that plaintiff has, by attaching all corporate property, exceeded the amount of assets it needs to secure its debt. Plaintiff stands ready and willing to receive evidence from defendant that property under levy of attachment is "clearly sufficient" to secure its claim. The instructions given by this court to the levying officer were quite explicit. This Court directed the levying officer to

attach "all corporate property, or so much thereof as is clearly sufficient to satisfy the amount to be secured by the attachment." The amount was specifically set forth to be $92,829.01. Once the levying officer determined that he has attached property which is "clearly sufficient to satisfy the amount to be secured," he has been directed to cease efforts. Plaintiff suggests that it is incumbent upon defendant to prove to the levying officer or this Court that the attachment is "clearly sufficient."

Plaintiff respectfully suggests that the circuit boards referenced in defendant's instant application do not meet the standard required. Plaintiff believes that these circuit boards constitute components for an electronic game which defendant has previously indicated is now worthless due to a lack of market interest in the product.

III

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests this Court not set aside its Right to Attach Order, that it not quash the Writ of Attachment, and that it not order the release of the Attachment Levies. Plaintiff respectfully invites this Court to make a determination as to the sufficiency of the property currently under Attachment to secure the claim of McGregor Sea & Air Services (America) Inc.

Respectfully submitted,

DATED: September 9, 1982 KIRBY AND HALLEN

By: _____
C. BRADLEY HALLEN
Attorneys for Plaintiff